

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of) MM Docket No. 94-10
THE LUTHERAN CHURCH -)
MISSOURI SYNOD) File Nos. BR-890929VC
) BRH-890929VB
For Renewal of the Licenses)
of Stations KFUD/KFUD-FM,)
Clayton, Missouri)

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To: The Honorable Arthur I. Steinberg
Administrative Law Judge


APR 1 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARYREQUEST FOR PERMISSION TO FILE APPEAL

THE LUTHERAN CHURCH - MISSOURI
SYNOD

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SUMMARY

The Lutheran Church-Missouri Synod (the "Church") hereby seeks leave of the Judge to appeal his decision to grant the NAACP's motion to modify the Hearing Designation Order and designate a discrimination issue under § 73.2080(a) of the Commission's Rules. The Judge lacks authority to add such an issue where, as here, the Commission has already thoroughly considered the matter and declined to designate an issue thereon. Even, however, if the Judge did have authority to modify the Hearing Designation Order, there are no facts to support the designation of such an issue. The Church therefore respectfully requests leave to appeal the Judge's decision to modify the Hearing Designation Order and designate a § 73.2080(a) discrimination issue.

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To: The Honorable Arthur I. Steinberg
Administrative Law Judge

REQUEST FOR PERMISSION TO FILE APPEAL

The Lutheran Church - Missouri Synod (the "Church"), by its attorneys and pursuant to § 1.301(b) of the Commission's Rules, hereby requests permission to file an appeal of the Presiding Judge's Memorandum Opinion and Order, FCC 94M-191 (released March 25, 1994) ("MO&O"). The MO&O modified Hearing Issue #1 in this proceeding to encompass an exploration of not only the Church's compliance with the affirmative action provisions set forth in § 73.2080(b) of the Commission's Rules, but its compliance with the nondiscrimination provisions of § 73.2080(a) as well. As set forth below, the Judge exceeded his authority by expanding Issue #1 on the basis of unsupported dicta in a Hearing Designation Order^{1/} ("HDO") which contains no preliminary finding of any discrimination at stations KFUD/KFUD-FM ("KFUD"). The error is compounded by the fact that the dicta is not only unsupported, but incorrect as a matter of law. This request presents a new or

^{1/} FCC 94-23 (released February 1, 1994).

novel question in that the Judge added on issue based solely on his interpretation of dicta contained in the HDO rather than on any new facts and circumstances that were not before the designating authority at the time of designation. Deferral of the appeal would also greatly prejudice the Church and could result in a remand for the Judge to consider his rulings on the § 73.2080(b) issue without reference to the evidence adduced under the § 73.2080(a) issue.

I. The Presiding Judge Lacked Authority to Modify the HDO

1. Where there has been "thorough consideration" of a question in the hearing designation order, the designation supplies "the law of the case." Atlantic Broadcasting Co. (WUST), 5 F.C.C.2d 717, 720 (1966). Absent any new facts or circumstances, the Presiding Judge has no authority to modify the issues set forth in the HDO. Id.^{2/} An examination of the HDO leaves no doubt that the Commission intentionally declined to add the

2/ See also Tri-State Broadcasting Co., 5 FCC Rcd 1156, 1173 (Rev. Bd. 1990); Ft. Collins Telecasters, 103 F.C.C.2d 978, 983-84 (Rev. Bd. 1986), review denied, 2 FCC Rcd 2780 (1987); Central Alabama Broadcasters, 88 F.C.C.2d 1501, 1503 n.4 (Rev. Bd. 1982); George F. Cameron Jr. Communications, 91 F.C.C.2d 870, 902 (Rev. Bd. 1982); Merrimack Valley Broadcasting, Inc., 52 R.R.2d 1210, 1221 (Rev. Bd. 1982), review denied, 55 R.R.2d 23 (1983); Simon Geller, 90 F.C.C.2d 250, 266 n.75 (1982); United Telephone Co., 42 F.C.C.2d 1003, 1005 (Rev. Bd. 1973). This "thoroughly considered" standard is variously stated as "reasoned analysis" as well. See, e.g., Central Texas Broadcasting Co., 90 F.C.C.2d 583, 594 (Rev. Bd. 1982); Central Alabama Broadcasters, 88 F.C.C.2d at 1503 n.4; Scott & Davis Enterprises, 48 R.R.2d 13, 14 (ALJ 1980).

§ 73.2080(a) discrimination issue, and that the Judge is therefore precluded from altering that decision.

2. First, a review of relevant cases reveals that the Review Board and the Commission's Administrative Law Judges have been successful in modifying a Commission HDO only where new facts arise after the hearing designation order is issued,^{3/} or when a review of facts outside the HDO makes clear that the Commission overlooked an important matter in drafting the HDO.^{4/} Where the Commission is clearly aware of a matter, but chooses not to designate an issue relating to it, an ALJ lacks authority to overturn that ruling. There need be no explicit statement that the Commission is declining to add a specific issue; its action in not specifying the issue in the face of the information included in the HDO is a sufficient indicator of the Commission's intent.

3. For example, in Newton Television Ltd., 3 F.C.C. Rcd 553 (Rev. Bd. 1988), the Commission designated a number of applicants for a comparative hearing for a television allocation near the Canadian border. The Commission noted in the HDO that the applicants' proposals exceeded the power limits allowed under

^{3/} See, e.g., Bennett Gilbert Gaines, 72 R.R.2d 170, 176 ¶27 (Rev. Bd. 1993).

^{4/} See, e.g., Digital Paging Systems of Philadelphia, 64 R.R.2d 392, 394 (Rev. Bd. 1987) (Where application was patently defective on its face and Common Carrier Bureau designated it for hearing rather than dismissing it, Review Board remanded application to Bureau for dismissal); Greater Chicago Sunday School, 46 R.R.2d 1257, 1258 (ALJ 1980) (Where designating authority overlooked the filing of applicant's amendment demonstrating financial qualification and designating authority designated financial issue against applicant on basis of original showing, ALJ deleted issue).

a Canadian treaty and that any construction permit granted would be conditioned upon the subsequent concurrence of the Canadian government. Id. at 557. When two of the applicants argued on appeal that their rivals should not have received a comparative coverage credit for their proposals because their coverage was based on power levels which exceeded the treaty limits and which had not been consented to by the Canadian government, the Review Board ruled that the HDO indicated that the Commission had been aware of the Canadian concurrence issue when it stated that any construction permit granted in the proceeding would have to be conditioned, and that, by not discussing any other implications of the Canadian matter, the Commission had "thoroughly considered" the issue and intentionally declined to place any limits on comparative coverage proposals. Id. In other words, the Review Board held that the Commission's failure to address any such limitations in its discussion in the HDO of the Canadian treaty put the matter "institutionally beyond our delegated reach." Id.

A. The HDO Thoroughly Considered the Stations' Entire EEO Record and Intentionally Declined to Add a Discrimination Issue

4. That the Commission's decision in the HDO is institutionally beyond the Judge's delegated reach is apparent from a review of the HDO. First, by the terms of the HDO itself, the Commission considered § 73.2080 in its entirety,^{5/} and even

^{5/} See HDO at paras. 4 and 6.

discussed the anti-discrimination prong of that rule found in § 73.2080(a). HDO at para. 4.

5. Second, the HDO contains approximately eight single-spaced pages discussing the Commission's EEO requirements and the activities of KFUD falling under the Commission's EEO Rule. HDO at 1-8. Based on this discussion, the HDO extracts two specific matters for issue designation. HDO at 8-12. The rationale for adding the first issue, a § 73.2080(b) issue regarding affirmative action, is described in a three page long subsection entitled "EEO Implementation." HDO at 8. The rationale for adding the second issue is in a second subsection entitled "Misrepresentation/Lack of Candor," which is two pages long and discusses the accuracy of KFUD's information regarding some EEO statistics. HDO at 11.

6. Given this extensive treatment of EEO matters at KFUD, it is entirely implausible to believe that the Commission inadvertently "forgot" to designate the § 73.2080(a) discrimination issue. The HDO discusses nothing but EEO related matters. It cannot plausibly be argued that the issue of KFUD's EEO performance (including nondiscrimination) was only before the Commission "in a peripheral manner"^{6/} and is therefore subject to revision by the Judge.

^{6/} Atlantic Broadcasting Co. (WUST), 5 F.C.C.2d 717, 720 (1966).

B. The Structure of the HDO Confirms that the Commission Intentionally Declined to Add a Discrimination Issue

7. That the Commission intentionally declined to add a discrimination issue is confirmed by a more detailed examination of the structure of the HDO. The "DISCUSSION" section of the HDO contains only two subsections -- one entitled "EEO Implementation" and one entitled "Misrepresentation/Lack of Candor." Thereafter, those two issues are designated. Nowhere in the HDO is there a subsection devoted to discrimination at KFUEO, nor is there any information in the HDO to support one. This very fact belies the NAACP's contention that the omission of a § 73.2080(a) reference in the designated issues was a "drafting error" by the Commission. While the omission of an "(a)" in the issue itself could arguably occur inadvertently, the NAACP has not contended, nor is it plausible, that the Commission left out the entire subsection of the HDO on which that issue would be based.

8. That such a separate subsection would exist if the Commission had meant to designate a discrimination issue is evident from a comparison of the KFUEO HDO with the Commission's hearing designation order for WXBK-FM, Milton, Florida. WXBK-FM, Inc., 6 FCC Rcd 4782 (1991). The WXBK-FM HDO is one of the most recent HDO's involving EEO matters in the context of a renewal. In that HDO, the Commission designated the same issues it designated in the KFUEO proceeding (EEO Implementation and Misrepresentation/Lack of Candor), as well as the § 73.2080(a) discrimination issue herein sought by the NAACP and added by the

Judge. The operative parts of the WXBM-FM HDO are structurally identical to the KFUD HDO. They both begin with "I. INTRODUCTION," proceed to "II. BACKGROUND," and then reach "III. DISCUSSION." In the "DISCUSSION" section, each includes subsection headings in initial capital letters without any section number or letter. Each includes a heading for "EEO Implementation" followed by a heading for "Misrepresentation/Lack of Candor." However, in the WXBM-FM HDO, unlike the KFUD HDO, there is a third heading -- "Discrimination." In the "Discrimination" section, the Commission discusses the matters to be considered at hearing and, thereafter, designates a third issue -- "To determine whether the licensee of Station WXBM-FM discriminated against Blacks in violation of § 73.2080(a) of the Commission's Rules." The identical nature of the two HDO's in all but this one very critical point abounds with significance. In Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 2577 (Rev. Bd. 1991), the Review Board wrote in an analogous situation that:

[T]here can be scant doubt that the Mass Media Bureau's failure to include the community ascertainment prong in the specific issues governing this case was a deliberate policy change, as witness the fact that the designation order in a contemporaneous noncommercial comparative case likewise omitted the community ascertainment prong from the issues set down there. The same is true of the hearing designation order in the more recent Cabrini College, 4 FCC Rcd 5462 (1989). Hence, the Board is actuated to infer that the failure of the instant Hearing Designation Order to require an ascertainment inquiry was not simply the consequence of bureaucratic inadvertence, but a purposeful policy choice.

Id. at 2578 (citation omitted).

9. It is important to note, too, that in the WXBM-FM HDO, the § 73.2080(a) issue is set out in a paragraph unto itself as opposed to merely being included in the paragraph designating the § 73.2080(b) issue. Thus, in order to accept the NAACP's contention of a drafting error, the Judge would have had to find that the Commission "inadvertently" omitted the discrimination heading, any discussion of a discrimination issue, and a separate issue designation paragraph for § 73.2080(a). While the HDO is perhaps "loose" in its unsupported use of the word "discriminatory" while discussing affirmative action efforts, it is beyond credibility for the NAACP to suggest that it is so poorly written as to have accidentally omitted all of these important portions.

C. The Drafters of the HDO, the Mass Media Bureau, Have Represented that the Omission of a Discrimination Issue Was Intentional

10. In response to the NAACP's filing of the "Motion to Modify Hearing Issues," the Mass Media Bureau itself filed an "Opposition to Motion to Modify Hearing Issues." In this Opposition, the Mass Media Bureau stated not only that the HDO had been correctly drafted, but that the NAACP's suggested interpretation of the HDO was not the correct or intended one, and that any preliminary findings of deficiencies in KFUD's EEO record fell within § 73.2080(b), not § 73.2080(a). Where counsel for the designating Bureau makes representations to the Judge as to whether an issue was intentionally or inadvertently not designated, it is proper for the Judge to consider and rely on

that representation in determining his authority to modify the HDO. See Digital Paging Systems of Philadelphia, Inc., 64 R.R.2d 392, 394 (Rev. Bd. 1987). The information in the Mass Media Bureau's Opposition clearly confirms that there was no intention to include a discrimination issue in the HDO, and the Judge therefore lacks the authority to overrule the HDO on that point.

II. The Judge's Determination That the Language of the HDO Requires Designation of a Discrimination Issue Is Based on An Erroneous Premise

11. As discussed above, the only situations in which the ALJ can modify a hearing designation order are (1) where new facts arise after the hearing designation order is issued, or (2) when a review of facts outside the HDO makes clear that the Commission overlooked an important matter in drafting the HDO. The MO&O notes that the decision to add a discrimination issue in this case is based on the existence of references to discriminatory employment practices contained in the HDO itself. Yet, under the Atlantic line of cases cited above, the language on which the Judge relied clearly cannot serve as the basis for adding an issue, since its very presence in the HDO indicates that the Commission considered such matters and nonetheless declined to add the issue. Conversely, if the Judge believes, as the Church does, that the use of the word "discriminatory" is a misstatement, and that the Commission never actually considered adding that issue, then there is no basis for adding the issue. In either case, the designation of the issue by the Judge is error, and must be reversed.

III. The Dicta in the HDO Regarding Discrimination Is Erroneous

12. The language in the HDO at paragraph 26 relied upon by the Judge in adding the discrimination issue states that "[i]n view of all of the foregoing, it appears that substantial and material questions of fact exist [sic] to whether the licensee's employment practices are discriminatory in violation of our EEO rule, 47 C.F.R. § 73.2080." This language is, however, a complete non-sequitur to the material preceding it, which discusses only the failure of KFUO to adequately recruit minorities, a § 73.2080(b) matter. It is this portion of the HDO that has apparently caused the confusion leading to the Judge's decision to modify the HDO. Paragraph 25 states that "the licensee's reasons for its failure to conduct recruitment at the FM station are inherently discriminatory" (emphasis added). Apparently based on this "conclusion," the HDO proceeds in the next paragraph to mistakenly state, in the language quoted by the Judge in the MO&O, that there is a question as to whether "the licensee's employment practices are discriminatory." HDO at para. 26 (emphasis added). There is, however, no discussion in the HDO of any discriminatory employment practice, and the language quoted from paragraph 26 is clearly a misstatement.

13. What is in the HDO, and what is apparently the basis for its erroneous application of the word "discriminatory," is the HDO's dislike of the argument, made previously by separate counsel on behalf of the Church, that based on the specialized format (classical music) of KFUO(FM), and the need for employees in certain positions to be knowledgeable about that format, the

Commission should consider using alternative data to the normal labor force statistics in judging the results of its recruitment efforts. As made clear by paragraphs 25 and 26 of the HDO, the Commission has, based solely on this legal argument, tentatively concluded that "the licensee's reasons for its failure to conduct recruitment at the FM station are inherently discriminatory." HDO at para. 25. In drawing this tentative conclusion, the HDO erroneously confuses the argument of counsel with the attitude and/or recruitment practices of the licensee.

14. In presenting this defense, counsel for the Church was advancing an argument similar to that which it had used in two prior, unrelated FCC cases that such counsel believed was favorably entertained by the FCC.^{7/} Such a defense has been raised by licensees in over a dozen other reported EEO proceedings,^{8/} and in none of these cases has the FCC ever even

7/ See Gulf-California Broadcast Co., 8 FCC Rcd 417, 418 (1993); Franklin Broadcasting Co., 57 F.C.C.2d 130 (1975). Significantly, in neither of these cases did the FCC suggest that such an argument demonstrates a discriminatory attitude on the part of the licensee for whom the argument was made.

8/ See, e.g., San Luis Obispo Limited Partnership, 9 F.C.C. Rcd 894, 903 n.20 (1994) (Where licensee argued that local minorities frequently were not fluent in English, educated through high school or were otherwise untrained due to their background in agriculture, Commission found no substantial and material question of fact warranting designation for hearing and no evidence of employment discrimination); Ogden Broadcasting of South Carolina, Inc., 7 F.C.C. Rcd 1895 (1992) (Where licensee argued that relevant labor force included only 2 minorities because only 2 minorities were currently employed in upper-level radio positions in county, Commission rejected argument but denied NAACP/NBMC petition for reconsideration of renewal grant without hearing); Goodrich Broadcasting, Inc., 7 F.C.C. Rcd 6655, 6658 (1992) (Where licensees argued that area minorities took jobs in local defense industry where pay was higher and educational
(continued...)

8/(...continued)

requirements lower, Commission found no evidence of discrimination and no substantial and material question of fact warranting further inquiry or hearing); WWGS/WCUP Partnership, 6 FCC Rcd 855 (1991) (Where licensee argued that it could not recruit minorities because it is located in a small, rural community with an agricultural economy, Commission found that stations' record did not warrant designation for hearing); Applications of Certain Broadcast Stations Serving Communities in the Sarasota, Florida Area, 5 FCC Rcd 5683, 5684 (1990) (Where licensee argued that on-air advertisements did not attract minority applicants because Blacks did not listen to the station, Commission found no substantial and material question of fact to warrant a hearing); Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area, 5 FCC Rcd 4893, 4895 n.16 (1990), aff'd, 8 FCC Rcd 398 (1993) (Where licensee argued that country and western format of station affected station's ability to attract minority applicants, Commission found that station's record did not warrant designation for hearing because it did not raise any substantial or material questions of fact about the licensee's employment practices); Delaware Broadcasting Co., 102 F.C.C.2d 133, 136 (1985) (Where licensee argued that small number of minority referrals was due to country and western format, Commission was "unconvinced" that format was cause but found no reason for a hearing on the station's EEO performance); Applications of Certain Broadcast Stations Serving Communities in the States of Louisiana and Mississippi, 94 F.C.C.2d 275, 283, 287 (1983) (Where radio station licensees argued that few Black men want to work for country and western stations and that Black interns prefer to work at television stations, Commission granted renewal applications without a hearing); Provident Broadcasting Co., 91 F.C.C.2d 1247, 1248-49 (1982) (Where all Blacks except one left station after format change from a Black to a "live uncanned country" format, Commission found no substantial and material question of fact and that renewal grant would serve the public interest); Voice of Charlotte Broadcasting Co., 77 F.C.C.2d 299, 300 (1980) (Where licensee argued that absence of Blacks at station was due to its "highly" stylized (rock, jazz and classical) format, Commission found no substantial and material question of fact); License Renewal Applications of Certain Suburban Broadcast Stations Serving the Washington, D.C. Market, 77 F.C.C.2d 911, 918 (1980) (Where licensee argued that country format of station made Black applicants unavailable, Commission granted renewal without hearing); Inquiry Into the Employment Policies and Practices of Certain Broadcast Stations Located in Florida, 44 F.C.C.2d 735, 738 aff'd 48 F.C.C.2d 666 (1974), (Where licensees argued that minority applicants

(continued...)

questioned the appropriateness of making the defense, much less designated a hearing over "discriminatory reasons" based on that defense. In fact, just last year, the Commission specifically rejected the contention that it should analyze such a defense to determine whether it is indicative of a discriminatory intent on the part of the licensee.^{2/} License Renewal Applications of Pasco Pinellas Broadcasting Co., 8 FCC Rcd 398, 399 (1993).

15. This defense has been misinterpreted in the extreme by the NAACP and ultimately, by the HDO. In presenting the argument, the Church relied on advice of counsel in an area where its reliance is most understandable, namely the schooled choice of legal arguments. The argument did not relate to the operation of KFUE(FM)'s hiring process, but merely asked the FCC to consider applying alternate data to local labor force statistics when attempting to benchmark the success of that process. The HDO's citation to this argument as the basis for its allegation of racial stereotyping at KFUE (1) misreads the pleadings in the record; (2) confuses an argument of counsel with the licensee's hiring practices; (3) violates the principle of Melody Music, Inc., 345 F.2d 730 (D.C. Cir. 1965), in that there is no rational basis for punishing the Church for an argument where numerous

8/(...continued)

were not "interested" in the stations' country and western formats, Commission concluded that grant of renewals was in public interest).

9/ The Commission likewise rejected the NAACP's argument based on Beaumont Branch of the NAACP v. FCC, 854 F.2d 501 (D.C.Cir. 1988) that this "evidence" of the licensee's discriminatory intent requires a hearing on the discrimination issue. License Renewal Applications of Pasco Pinellas Broadcasting Co., 8 FCC Rcd 398, 399 (1993).

other licensees have made the same argument and suffered no retribution; and (4) violates the licensee's right to make all available arguments in its defense without being taken to task for raising a particular defense.

16. While the Church acknowledges that the Judge lacks the authority to eliminate this erroneous discussion in the HDO, it is certainly willing to present its evidence in hearing and is confident that the matter will be rectified in the Judge's Initial Decision. The Church is not, however, willing to quietly endure the increased discovery burdens and increased hearing complexity that will be generated by the wrongful addition of a discrimination issue based on the HDO's confusion of a legal defense with the licensee's recruitment program.


Conclusion

In sum, for the reasons set forth above, the issues in the HDO were properly framed and the Judge lacked any authority to expand the issues in the HDO. Accordingly, the Church respectfully requests leave to appeal this ruling of the Judge.

Respectfully submitted,

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Dated: April 1, 1994

CERTIFICATE OF SERVICE

I, Sybil R. Briggs, a secretary of the law firm, Fisher Wayland Cooper Leader & Zaragoza hereby certify that I have, this 1st Day of April, 1994, caused to be sent by United States first class mail, postage prepaid, a true and correct copy of the foregoing **"REQUEST FOR PERMISSION TO FILE APPEAL"** to the following:

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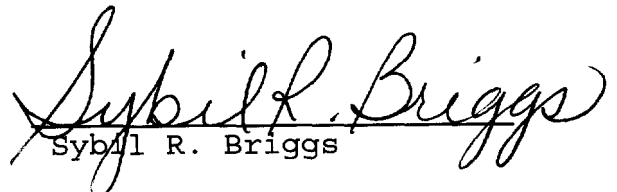
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